IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.19/2005

Mrs. Niquela D'Silva,
daughter of Antonio Gonsalves,
Housewife, Indian National,
resident of H.No.214,
Ambelim Village, Salcete, Goa. ..... Petitioner.

V/s.

1. (A) Mr. Jefery Savio D'Silva,
(B) Mr. Dameson D'Silva,
(C)Ms. Lavinda D'Silva
All residing at H.No.214,
Ambelim Village, Salcete, Goa.

2. Mrs. Conceicao Dilsva,
resident of H.No.219, Sokowado,
Ambelim, Salcete, Goa.

(3) Mrs. Mariana D'Silva (deceased)
3(a) Mrs. Saluzina D'Silva e Pereira
and her husband;
(b) Mr. Regy Pereira;
(c) Mrs. Olvin D'Silva (widow)
(d)Master Mariano D'Silva,
All residents of Flat No.2,
Peace Apartments,
Versova Village, Andheri (West),
Mumbai 400 061.

4. Mr. Xavier Cardozo,
resident of H.No.219,
Sokowado, Ambelim, Salcete, Goa.

5. Mr. Minguel Avelino
Raimundo D'Silva, aged 41 years,
service, married, son of late
Roque Santana D'Silva, resident of
House No.214, Ambelim,

Salcete, Goa. ..... Respondents.

Mr. J. F. Melo, Advocate for the petitioners.

Mr. Sudesh Usgaonkar, Advocate for the respondents.

CORAM : R.S. MOHITE, J.

DATE : JULY 13, 2007.

ORAL JUDGMENT :

Heard both sides. Rule. By consent, rule made returnable forthwith.

2. This is a petition impugning a Judgment and Order passed by the Ist Addl. District Judge, Margao in Civil Misc. Application No.73/2004, dismissing the said application filed by the petitioner before him. The original suit filed by the plaintiff, the present petitioner, was for a declaratory relief that she was an owner of the suit property. The suit came to be dismissed on 21.5.2003. The plaintiff applied for a certified copy on 28.5.2003. Delivery of the same was given on 16.6.2003. The appeal was presented on 30.6.04. There was, therefore, delay of 333 days in filing of the appeal. It appears that the appeal was filed by the defendant No.2 who was the wife of defendant No.1. In her application for condonation of delay, she

stated that the original plaintiff No.1 lost his mental balance and cognitive faculties for a period of one year and since then he was in a disturbed mood, used to repeatedly turn aggressive and ran away from the house somewhere in the year 2003. She stated that the situation in the house was chaotic and she had to spend sleepless nights and was anxious to know the whereabouts of her husband. Her husband was traced and brought home but he used to suddenly disappear without informing her and therefore, she was under mental stress and agony and could not pursue the matter. He was treated by Dr. Rui Tito Vaz who issued a Medical Certificate dated 5.1.04. It was also alleged that the Medical Certificate dated 5.1.04 issued by Dr. Rui Tito Vaz got misplaced and could not be presented to her Lawyer.

3. The respondents have filed reply denying all the allegations.

4. I have perused the reasonings given in the impugned Order. The Court has accepted the position that a liberal approach has to be adopted and liberal interpretation of the expression "sufficient cause" has to be made in dealing with an application for condonation of delay. However, I find that thereafter the reasons given by the applicant have not been accepted. Amongst the reasons which are given is that the Roznama of Civil Suit No. 151/97 indicated that the plaintiff was present in person on 3.8.03 and

21.5.03. Merely because the plaintiff was present on two occasions that by itself would not disprove that medical condition of the plaintiff, specially when there was a medical certificate to show that he was under treatment of a Doctor for a long period of time. It is also relevant that the plaintiff No.1 did not file any appeal and the appeal ultimately had to be filed by his wife.

5. A reference has been made to the fact that plaintiff No.1 filed affidavit-in-evidence before the lower Court and he was cross examined on 4.1.2003 and again on 13.2.2003. These facts pertain to prior to the passing of the Decree and ought not to have been into account while considering the contentions raised in the application for condonation of delay, specially when such contentions pertain to a period after passing of the Decree. In my view, in the matters of condonation of delay, mere long delay is not the only relevant factor, but the question as to whether any prejudice is caused to the other side is also relevant.

6. It is sought to be contended that by the respondents that they have instituted another suit for damages on the footing that the suit filed by the present petitioner was malicious. It is their argument that prejudice will be cause to them and they will be non-suited in case the condonation of delay is allowed. This contention is not correct. Merely because the delay is

condoned does not mean that the first appeal is automatically allowed. Unless the first appeal filed by the petitioner is allowed, the order of dismissal of the suit filed by the petition stands and the cause of action for filing the second suit does not disappear. In the circumstances, I am inclined to allow this petition, subject to costs.

7. Rule is, therefore, made absolute, subject to payment of costs of Rs.10,000/-. The costs to be deposited in the Appellate Court within a period of three weeks from today and on deposit of the costs, the present respondents will be at liberty to withdraw the same.

R.S. MOHITE, J.

ssm.